Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ANGELINA ANITA CARRERAS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The Fourteenth Judicial District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

— Angelina Anita Carreras and her male friend were sitting unclothed from the waist up in a public park. Both sat quietly, watching the activities at a beach festival. Petitioner, Carreras, was arrested for this conduct; her male companion was not. Petitioner was convicted of disorderly conduct.

The questions presented here are:

Was petitioner denied equal protection under the law?

Was petitioner denied due process?

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PETITION FOR WRIT OF CERTIORARI

Angelina Anita Carreras, petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fourteenth Judicial District of Texas entered on December 30, 1996, because petitioner's conviction was upheld in violation of the Fourteenth Amendment to the United States Constitution.

OPINION BELOW

The published opinion of the court below is reprinted in Appendix 1 hereto ("App. 1") at page App. 1. Petitioner filed a motion for rehearing and *en banc* reconsideration, both of which were overruled. (*See* App. 2, App. 13.) Petitioner then filed a petition for discretionary review in the Texas Court of Criminal Appeals, the highest Texas court of review of criminal cases, but the petition was refused. (*See* App. 3, App. 15). Therefore, no opinion was issued.

JURISDICTION

The judgment and opinion sought to be reviewed was entered on December 30, 1996 (*see* App. 1, App. 1). Petitioner timely filed a motion for rehearing which was overruled on January 23, 1997 (*see* App. 2, App. 13). Petitioner timely filed a petition for discretionary review in the Texas Court of Criminal Appeals, which was refused on June 4, 1997 (*see* App. 3, App. 15). Pursuant to

Supreme Court Rule 13.1, this petition has been filed within 90 days of the refusal of the petition for discretionary review.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The following Constitutional provision is involved in this case:

The Fourteenth Amendment, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV § 1.

STATUTES INVOLVED

The following Texas statute is involved in this case:

Section 42.01(a)(2) of the Texas Penal Code

> (a) A person commits an offense if he intentionally or knowingly: (2) makes an offensive gesture or display in a public place, and the gesture or display tends to incite an

immediate breach of the peace. TEX. PENAL CODE ANN. § 42.01(a)(2)[1].

STATEMENT OF THE CASE

Petitioner, a woman, was sitting with her male friend in a public park. Both were unclothed from the waist up. Petitioner was arrested and charged with disorderly conduct. The man was not. At trial, petitioner moved for an instructed verdict on the grounds that she was denied equal protection under the law, and that her conduct was not disorderly as a matter of law. Her motion was denied and she was convicted.

On appeal, the court of appeals affirmed the conviction, holding that there was no evidence that petitioner had been denied equal protection. The court of appeals did not address petitioner's argument that her conduct was not disorderly. Petitioner's motion for rehearing and *en banc* reconsideration were overruled. The Texas Court of Criminal Appeals then refused her petition for discretionary review.

[1] Petitioner was convicted prior to September 1, 1994, the effective date of the revised Texas Penal Code. *See* Acts 1993, 73rd Leg., Ch. 900, § 1.18(b). Therefore, all references to the penal code are to the code in effect at the time of her conviction.

REASONS FOR GRANTING THE WRIT

1. Petitioner Was Denied Equal Protection

The evidence in this case is clear and uncontroverted. Petitioner and her male companion were sitting together unclothed from the waist up in a public park. Both were sitting quietly on the grass watching the activities at a beach festival. Petitioner was arrested and charged with disorderly conduct. Her male companion was not.

The undisputed evidence is as follows:

S.F. III, P 63, LL 2-11

Q: Isn't it true that Ms. Carreras was doing exactly the thing that the male with her was, the only difference being that she is a female?

A: With both of them having their tops off?

Q: Yes, sir.

A: Yes.

Q: Was Ms. Carreras doing anything, anything different than the man sitting with her?

A: No. They were both seated in the same area with their shirts off.

S.F. III, P 72, L 25-P 73, L 12

Q: It was clear to you from the way that you saw her before the police arrived that she was sitting there with her shirt off?

A: Yes, sir.

Q: And did you see a man sitting there with her?

A: Yes, sir.

Q: Did he have his shirt off?

A: Yes, he did.

Q: Were they doing anything that was – were they engaged in the same conduct?

A: Yes, they were.

Q: Was she doing anything different than he was?

A: No, he was – he wasn't – no, she wasn't.

S.F. III, P 86, LL 2-5

Q: Was Ms. Carreras doing anything differently than the man that was with her?

A: She had her shirt off sitting in a different position, but as far as the physical activity, no.

S.F. III, P 99, LL 4-10

Q: So was Ms. Carreras doing anything differently than the man that was with her?

A: Not to my knowledge, no, sir.

Q: What you saw – sounds like you saw what they were doing?

A: I didn't see her doing anything different than what he was doing, no, sir.

S.F. III, P 110, LL 6-8

Q: Did the man that was in this case, that was by Ms. Carreras, he had his shirt off, right?

A: I believe, yes, sir.

S.F. III, P 111, LL 12-15

Q: As far as you could see, was the man that was with Ms. Carreras doing anything differently than she was?

A: No, sir.

A videotape was also introduced which shows the conduct of petitioner and the man who was with her. (*See* State's Exhibit 1; S.F. III, 106.)[2] The videotape shows petitioner and her male friend engaging in the same conduct. Petitioner was arrested; the man was not. (S.F. III, 97, 99.)

Petitioner defended at trial on the ground that she was denied equal protection under the law. *See* U.S. CONST. amend. XIV § 1. During trial, petitioner introduced evidence to support her claim of denial of equal protection. (S.F. III, 63, 72, 73, 86, 97, 99, 110, 111), and moved for an instructed verdict on that ground (S.F. III, 116-117). On appeal, petitioner filed four briefs in which she argued that her right to equal protection had been denied. (*See* Appellant's Brief 13-28; Appellant's Reply Brief 1-9; Appellant's Motion for Rehearing 4-14; and Petition for Discretionary Review 9-20, 23-24.)

The court of appeals held that "there was no evidence that females anywhere were prosecuted when males allegedly doing the same thing were not prosecuted under similar circumstances" (App. 1, App. 7), that "the evidence produced at trial failed to identify any individuals who were not females, who could have been prosecuted for the offense for which petitioner was charged, but were not so prosecuted" (App. 1, App. 8), and that petitioner "produced no evidence to prove her

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[2] Exhibits are part of the appellate record, *Durrough v. State*, 693 S.W.2d 404, 405 (Tex. Crim. App. 1985), and the court of appeals stated in its opinion that the videotape was in evidence (App. 1, App. 2).

claim of denial of equal protection of the laws." (App. 1, App. 10.) These holdings are outrageous, because the facts are uncontroverted that petitioner was arrested and charged with disorderly conduct while engaging in the same conduct as a man who was not arrested or charged. It is obvious from the record that a man could have been prosecuted for the same offense, but he was not.

It appears that the court of appeals chose to avoid petitioner's equal protection argument through false "no evidence" findings. But due process requires the court to deal with constitutional defenses. *Village of Arlington Heights v. Metro. Housing Div.*, 429 U.S. 252, 266 (1977). "Since the right to be free from selective prosecution is based in the Fourteenth Amendment's Equal Protection Clause, state criminal courts are required to recognize, hear, and determine a defense based on that right." *Munson v. Janklow*, 421 F.Supp. 544, 550 (D.S.D. 1976), *aff'd*, 563 F.2d 933 (8th Cir. 1977). By side-stepping petitioner's equal protection argument by a finding of "no evidence," the court of appeals violated the basic notion of a right to be heard, and violated petitioner's right to due process. *See* U.S. CONST. amend. XIV § 1; *see also Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

The court of appeals also avoided petitioner's equal protection argument by holding that petitioner did not prove the essential elements of a selective-prosecution case. (App. 1, App. 7.) Petitioner urged at oral argument that this is not a case of selective prosecution (*see* App. 1, App. 2-3), because no crime had been committed. Petitioner moved for an instructed verdict on the ground that her conduct was not disorderly as a matter of law (S.F. III, 116-117). She brought an independent point of error on

appeal, arguing that her conduct was not disorderly as a matter of law (Appellant's Brief, 28-29; Appellant's Reply Brief, 1-9; Appellant's Motion for Rehearing, 15-16; Petition for Discretionary Review, 6-9). The court of appeals did not address this point of error. The court of appeals held instead that petitioner's argument that this is not a case of selective prosecution was waived because it had not been briefed (*see* App. 1, App. 4).

A selective-prosecution defense assumes that the defendant was guilty of the crime charged. The defendant's guilt is not in issue; however, the defendant alleges that others equally guilty were not prosecuted or treated equally for the same offense. *See e.g., United States v. Armstrong*, 518 U.S. ___, 116 S.Ct. 1480 (1996).

In this case, petitioner contends that she committed no crime. In that regard, the State admitted that petitioner's male companion "did not commit an offense" (State Appellate Brief, 7). The court of appeals, however, addressed this case as if petitioner solely defended based on equal protection grounds, not addressing the point of error that her conduct was not disorderly. Even if the court of appeals is correct, that this is a selective-prosecution case, petitioner met her burden of proof that she was selectively prosecuted, and that she was denied equal protection under the law.

The State cannot selectively prosecute where such selective prosecution actually or purposefully discriminates against a member of a suspect class. *Oyler v. Boles*, 368 U.S. 448, 456 (1962). "Classifications based upon gender, not unlike those based upon race, have traditionally

been the touchstone for pervasive and often subtle discrimination." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1970). "Our Nation has had a long and unfortunate history of sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). Thus, "classifications based upon sex are inherently suspect, and must therefore be subjected to strict judicial scrutiny." *Id.* at 688. Therefore, when members of both sexes are engaged in the same conduct, the State cannot prosecute a member of one sex for such conduct and not the other.

In sex-based selective prosecution cases, it is not necessary for the person charged to prove that the State intended to discriminate. A showing of discriminatory intent is not necessary when the equal protection claim is based on overt discrimination. *Wayte v. United States*, 470 U.S. 598, 609 n.10 (1985); *see also Strauder v. West Virginia*, 100 U.S. 303 (1880). Where members of both sexes were engaged in the same conduct, and one was arrested for such conduct but the other was not, overt discrimination is obvious. Therefore, pursuant to *Wayte*, the person charged need not show a discriminatory intent on the part of the State. Accordingly, to prove that her right to equal protection was denied through selective prosecution, petitioner only had to introduce evidence that she was engaged in the same conduct as a man, and that she was arrested for such conduct and the man was not.

Every witness testified that petitioner was not doing anything differently than the man sitting with her, but petitioner was arrested and the man was not. (S.F. III, P

63, L 2-11; P 72, L 25-P73, L 12; P 86, L 2-9; P 99, L 4-10; P 109, L 25-P 110, L 2; P 110, L 6-8; P 111, L 9-15.)

The arresting officer testified:

S.F. III, P 97, LL 15-19

Q: Did you see a male sitting next to the defendant when you first made contact with the defendant?

A: Yes, I did.

Q: And did you arrest that male?

A: No, I did not.

S.F. III, P 99, LL 4-6

Q: So was Ms. Carreras doing anything differently than the man that was with her?

A: Not to my knowledge, no, sir.

Contrary to the court of appeals' holdings, this evidence proves that a female was prosecuted when a male doing the same thing was not prosecuted under similar circumstances, that a male could have been prosecuted for the offense for which petitioner was charged, but was not so prosecuted, and is direct evidence to prove petitioner's claim of denial of equal protection of the laws. Because the State overtly discriminated against a member of a suspect class, such selective prosecution was improper under the United States Constitution. *See Oyler*, 368 U.S. at 456.

The disorderly conduct statute under which petitioner was charged is gender neutral, that is, the statute itself does not favor one gender over the other. However, a law nondiscriminatory on its face may be grossly discriminatory in its application. *Williams v. Illinois*, 399 U.S.

235, 242 (1970); *Griffin v. Illinois*, 351 U.S. 12, 17 n.11 (1956). The unequal application of a state statute to those who are entitled to be treated alike is a denial of equal protection. *Snowden v. Hughes*, 321 U.S. 1, 8 (1944); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886).

Intentional discrimination by the State on the basis of gender violates the Equal Protection Clause. *J.E.B. v. Alabama*, 511 U.S. 127, 130-131 (1994). In *United States v. Virginia*, 518 U.S. ___, ___, 116 S.Ct. 2264, 2274 (1996), the Court held that in order to meet the requirements of the Equal Protection Clause, the State must prove an "exceedingly persuasive justification" to defend gender-based government action. The Court issued a mandate that must be followed by lower courts in reviewing gender-based discrimination cases. As a standard of review, the Court stated:

> To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment . . . for which relief is sought, the reviewing court *must* determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. *Id.*, 116 S.Ct. at 2275 (emphasis added).

Therefore, the court below was required to determine whether the State proffered an "exceedingly persuasive justification" for discriminating against petitioner. However, the lower court did not mention the State's obligation to prove an "exceedingly persuasive justification" in its opinion. The court of appeals made no finding that the State proffered *any* justification for its discriminatory

action. Therefore, the court of appeals did not follow the required standard of review in this case.

The only justification offered by the State for discriminating against petitioner is that some individuals were "offended" or "bothered" by her conduct. (State's Brief 7; S.F. III, 27, 33, 53, 55, 70, 82.) But the fact that some people may be "offended" or "bothered" by another's conduct, does not provide an "exceedingly persuasive justification" which will allow the State to discriminate. *See Cohen v. California*, 403 U.S. 15 (1971).

The Court stated in *Cohen* that the State may not excise conduct of an individual it considers to be "offensive," upon the theory that it is likely to cause a violent reaction or upon the assertion that the State may prohibit such conduct as a guardian of public morality. 403 U.S. at 22. Nor may the State justify arresting persons engaged in conduct that it considers to be offensive on the ground that it did so in order to protect sensitive individuals. *Id.* at 21. Sensitive individuals can "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.*

Some may argue that petitioner's conduct was in bad taste. However, the government may not impose its power to force persons to act in good taste. The Constitution leaves matters of taste largely to the individual. *Id.* at 25.

The court of appeals also imposed an erroneous burden on petitioner by holding that petitioner must show a "*persistent* failure to prosecute men as well as women." (App. 1, App. 10, emphasis added.) This holding is a gross misstatement of the law, contrary to the holdings of

this Court. The court of appeals relied on *State v. Johnson*, 246 N.W.2d 503 (Wis. 1976),[3] in which the Wisconsin court held that to avoid prosecution on equal protection grounds it must be shown that the prosecution was "persistent." *Id.* at 506. The Wisconsin court cited *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Reed v. Reed*, 404 U.S. 71 (1971), as authority for this proposition. But neither of these cases so hold!

In *Snowden v. Hughes*, 321 U.S. 1 (1944), the Court ruled that "[s]tate action may be a purposeful denial of equal protection, even though such action is *neither systematic nor long-continued.*" *Id.* at 9-10 (emphasis added). "A consistent pattern of official discrimination is not a necessary predicate to a violation of the Equal Protection Clause." *Village of Arlington Heights v. Metro. Housing Div.*, 429 U.S. 252, 266 n.14 (1977). "A single invidiously discriminatory governmental act would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions." *Id.* Therefore, only *one* instance of gender-based discrimination is necessary to prove a denial of equal protection. Thus, the court of appeals required petitioner to meet a burden this Court has held not to be required.

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[3] The court of appeals erroneously cited *State v. Johnson* in its opinion as being found at 257 N.W.2d 503.

2. Petitioner Was Denied Due Process

A. The Lower Court Failed To Address Petitioner's Argument That Her Conduct Was Not Disorderly

Petitioner was convicted of disorderly conduct under the Texas Disorderly Conduct Statute. *See* TEX. PENAL CODE ANN. § 42.01(a)(2).[4] During trial, petitioner moved for an instructed verdict on the ground that her conduct did not constitute disorderly conduct as a matter of law (S.F. III, 116-117). The motion was denied. On appeal, petitioner again argued that as a matter of law her conduct was not disorderly. (Appellant's Brief 28-29; Appellant's Reply Brief 1-9; Appellant's Motion for Rehearing 15-16; Petition for Discretionary Review 6-9.) The court of appeals did not address this argument in its opinion. By the lower court's failure to address this ground of appeal, petitioner's right to due process was violated. *See* U.S. CONST. amend. XIV § 1. *See also Snyder*, 291 U.S at 105.

B. Petitioner's Conduct Did Not Tend To Incite Violence

Petitioner strongly urges that she was convicted without proof of an essential element of the crime for which she was charged.

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[4] Petitioner was not in direct violation of any statute. No Texas law prohibits a woman from appearing in public unclothed from the waist up.

Under the Texas Disorderly Conduct Statute a person may be convicted only if he or she intentionally or knowingly makes an offensive gesture or display which tends to incite an immediate breach of the peace. *See* TEX. PENAL CODE ANN. § 42.01(a)(2). This Court has held that to bring about a breach of the peace, the conduct in question must tend to incite violence. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The Court held in *Chaplinsky*, "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight." *Id.* at 573. To meet the constitutional test, there must be a likelihood that the person addressed would make an immediate violent response. *See Gooding v. Wilson*, 405 U.S. 518, 528 (1972).

Thus, under this Court's guidelines, a gesture or display proscribed by section 42.01(a)(2) of the Texas Penal Code must be conduct likely to incite violence. However, there is not one shred of evidence that actual or threatened violence occurred or was about to occur as a result of petitioner's conduct.

The only evidence offered by the State was that some individuals were "offended" or "bothered" by petitioner's conduct. (S.F. III, 27, 33, 53, 55, 70, 82.) But the fact that certain conduct may "bother" or "offend" others is not tantamount to inciting violence.

The State may not excise conduct of an individual it considers to be "offensive," upon the theory that it is likely to cause violent reaction or upon the assertion that the State may prohibit such conduct as a guardian of public morality. *Cohen v. California*, 403 U.S. 15, 22 (1971). Where the State produces no evidence that anyone who

saw the defendant was in fact violently aroused or that the defendant intended such a result, the defendant cannot be convicted of disturbing the peace. *Id.*, 403 U.S. at 20.

Under Texas law, actual or threatened violence is an essential element of a breach of the peace. *Woods v. State*, 213 S.W.2d 685, 687 (Tex. Crim. App. 1948); *Head v. State*, 96 S.W.2d 981, 982 (Tex. Crim. App. 1936). The State produced no evidence to show that petitioner's conduct caused actual or threatened acts of violence. There is no evidence that anyone who saw petitioner was in fact violently aroused or that petitioner intended such a result. Therefore, the State did not prove an essential element upon which to base a conviction of disorderly conduct.

Because the State's proof did not meet an essential element for a conviction of disorderly conduct, petitioner moved for an instructed verdict that her conduct was not disorderly as a matter of law. Under Texas law, an attack on the denial of a motion for instructed verdict is an attack on the legal sufficiency of the evidence. *Madden v. State*, 799 S.W.2d 683, 686 (Tex. Crim. App. 1991); *Reynolds v. State*, 848 S.W.2d 785, 789 (Tex. App. – Houston [14th Dist.] 1993, *pet. ref'd*).

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the accused is charged. *In re Winship*, 397 U.S. 358, 364 (1970). A conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the

offense charged violates due process. *Jackson v. Virginia*, 443 U.S. 307, 314 (1979).

Because the State failed to prove an essential element of a breach of the peace, that is, that petitioner's conduct caused actual or threatened violence, the failure to grant petitioner's motion for an instructed verdict and the affirmance of her conviction by the court of appeals violated her right to due process under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Affirmed and Opinion Filed December 30, 1996.

In The

Fourteenth Court of Appeals

NO. 14-95-00297-CR

ANGELINA ANITA CARRERAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 12
Harris County, Texas
Trial Court Cause No. 93-24826

OPINION

Angelina Anita Carreras appeals her conviction by a jury for disorderly conduct. TEX. PENAL CODE ANN. § 42.01(a)(2) (Vernon 1991).[1] The trial court assessed her punishment at a $500.00 fine. In two points of error, appellant contends the trial court erred by refusing to grant her motion to quash and her motion for an instructed verdict on the grounds that appellant was prosecuted in violation of the equal protection clauses of

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[1] The crime for which appellant was convicted was committed before September 1, 1994, the effective date of the revised penal code. *See* Acts 1993, 73rd Leg., Ch. 900, § 1.18(b). Therefore, all references to the penal code are to the code in effect at the time the crime was committed.

the federal and state constitutions because the statute was being selectively and discriminatorily applied. We affirm.

Appellant, a woman, and a male friend went to the Sylvan Beach Festival on April 25, 1993, in LaPorte, and both of them removed their tops and sat, nude from the waist up, in a grassy area. Between 15,000 and 20,000 people were present at the festival which was a family-oriented event, with a parade, carnival, and various activities. Witnesses testified appellant was sitting on the grass with her breasts exposed, that they found this conduct offensive, and that it upset children and their parents. Officer Tippit testified that some of the children were pointing at appellant and getting upset which caused their parents also to be upset. Ms. Wheeler, the chairperson for the festival, testified that she asked appellant to put her top on but she refused. Appellant made a video tape of the entire transaction which was placed in evidence. Neither appellant nor her male friend testified.

Appellant contends that the trial court erred in overruling her motion to quash the complaint and her motion for a directed verdict. Appellant argues that by arresting only her for disorderly conduct, and not her male friend who was also topless, the prosecution violated her right to equal protection of the laws by engaging in selective prosecution of her only. She claims such selective prosecution violates Article 1, §§ 3 and 3a, of the Texas Constitution, providing equal rights and equal protection under the laws, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, imposing the duty of equal protection of the laws upon the states. On oral argument, appellant argued that

this is not a selective prosecution case and is simply a case where a woman's equal protection rights have been violated.

Appellant was arrested for disorderly conduct pursuant to article 42.01(a)(2), Texas Penal Code, which provides, in pertinent part:

> (a) A person commits an offense if he intentionally or knowingly: (2) makes an offensive gesture or display in a public place, and the gesture or display tends to incite an immediate breach of the peace.

In her motion to quash the complaint, appellant stated as grounds for her motion, in pertinent part:

> [S]aid statute [article 42.01(a)(2), Texas Penal Code] is unconstitutional as applied to the facts presented in this case (namely, defendant, a woman, while a spectator at the Sylvan Beach Day Festival at Sylvan Beach Park would not have been arrested but for the fact that she had no clothing covering her breasts; at least one male was exposing his breasts/chest at the same location and in the same manner as defendant with impunity) in that it violates the equal protection clause [of the state and federal constitutions].

In her oral motion for directed verdict, appellant stated, in pertinent part:

> So it is not only her conduct was not disorderly, but also under the equal protection clause of the Texas Constitution, the protection clause of the U.S. Constitution and the Equal Rights of the Texas Constitution, she is being prosecuted solely because she is a woman.

Both appellant's motions were overruled by the trial court. Appellant's points of error one and two claim the trial court erred by overruling these grounds in violation of her constitutional right to equal protection of the laws. Appellant argues she is a woman and was prosecuted for being topless, when a topless male friend with her was not, in violation of the equal protection clauses. We will review both points of error together.

This is a selective-prosecution case involving prosecution under the misdemeanor disorderly conduct statute which is a gender neutral statute. Appellant admits in her brief that the disorderly conduct statute is gender neutral in that the offense of disorderly conduct is equally applicable to any person, regardless of sex. *See Casarez v. State*, 913 S.W.2d 468, 493 (Tex. Crim. App. 1994) (opinion on motion for reh'g) (discriminatory practices based on sex are prohibited unless substantially related to the accomplishment of an important government purpose). Appellant's claim, at oral argument, that this is not a selective-prosecution case is not supported by argument or authority in any of her briefs. Appellant has waived her claim that this is not a selective-prosecution case. *Heitman v. State*, 815 S.W.2d 681, 690 n.23 (Tex. Crim. App. 1991); *Tell v. State*, 908 S.W.2d 535, 539 (Tex. App. – Fort Worth 1995, *no writ*).

In the recent case of *U.S. v. Armstrong*, 116 S.Ct. 1480 (1996), the United States Supreme Court, reviewed the law of selective prosecution. In response to their indictment on "crack" cocaine and other federal charges, the defendants in *Armstrong* filed a motion for discovery or for dismissal, alleging that they were selected for prosecution because they are black. The district court granted

the motion over the government's argument that there was no evidence or allegation that it had failed to prosecute nonblack defendants. The government refused to comply with the discovery order and the district court dismissed the case. The Ninth Circuit affirmed the judgment holding that the proof requirements for a selective-prosecution claim do not compel a defendant to demonstrate that the government has failed to prosecute others who are similarly situated. The United States Supreme Court reversed and remanded the case, and held that a defendant must make a threshold showing that the government declined to prosecute similarly situated suspects of other races before being entitled to discovery on a claim that he was singled out for prosecution on the basis of his race. The court found the justifications for a rigorous standard of proof by the defendant in an alleged selective-prosecution case require a correspondingly rigorous standard for discovery in aid of it. *Id.* at 1489.

The Supreme Court reviewed the requirements to prove a selective-prosecution claim, and stated in pertinent part:

> A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one. These cases afford a "background presumption" [citation omitted] that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.

* * *

> In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion" [citation omitted].
>
> * * *
>
> Of course, a prosecutor's discretion is "subject to constitutional constraints" [citation omitted]. One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment [citation omitted] is that the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification," *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962). A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law. *Yick Wo v. Hopkins*, 118 U.S. 356, 373, 6 S.Ct. 1064, 1073, 30 L.Ed. 220 (1886).
>
> In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present "clear evidence to the contrary" [citation omitted].

Id. at 1486.

The Supreme Court further held that a claimant must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a

discriminatory purpose. *Id.* at 1487. To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. *Id.* The Supreme Court found that a "study" listing twenty-four defendants by race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case, did not constitute "some evidence tending to show the existence of the essential elements of" a selective-prosecution claim for crack offenses; the study failed to identify individuals who were not black, could have been prosecuted for offenses for which the defendants were charged, but were not so prosecuted. *Id.* at 1489.

In this case, appellant produced *no* evidence "tending to show the existence of the essential elements of" a selective-prosecution claim. *Id.* at 1486-1489. Neither appellant nor her male friend testified. There was no evidence that females anywhere were prosecuted when males allegedly doing the same thing were not prosecuted under similar circumstances. Appellant's expert witness testified only at the hearing on her motion to quash the complaint and the testimony was not directed to "different treatment of similarly situated persons" as is required to prove selective prosecution. *Id.* at 1489. The question addressed to appellant's expert witness, Dr. William Simon, professor of sociology, University of Houston, was "why society considers that women should have their shirts on when men do not?" Dr. Simon's testimony addressed the physical differences between men and women and the fact that men and women in today's American society still regard female breasts as "erotic objects." Dr. Simon also testified that other

"enlightened" societies in other countries do not consider female breasts to be erotic objects. On cross-examination by the state, Dr. Simon testified that public exposure of female breasts would cause a disturbance among both men and women. The evidence produced at the trial "failed to identify any individuals who were not" females, "could have been prosecuted for the offenses for which" appellant was "charged, but were not so prosecuted." *Id.* at 1489.

In *Gawlik v. State*, 608 S.W.2d 671 (Tex. Crim. App. 1980), the court held: "The burden of establishing *prima facie* the fact of selective prosecution lies upon the defendant, since the presumption is always that a prosecution for violation of a criminal law is undertaken in good faith and in a nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice." *Id.* at 673. The *Gawlik* court found that appellant made no effort at the trial to establish the alleged discriminatory prosecution and concluded that nothing was presented for review. *Id.* In *County v. State*, 812 S.W.2d 303 (Tex. Crim. App. 1989), the appellant brought forth no evidence indicating the existence of purposeful discrimination and the court found appellant failed to meet his burden of proof. *Id.* at 309. *See also Satterwhite v. State*, 726 S.W.2d 81, 84 (Tex. Crim. App. 1986), *rev'd on other grounds*, 108 S.Ct. 1792 (1988).

There are no Texas cases directly involving the particular fact scenario presented here involving nudity above the waist in public by a female being punishable as disorderly conduct where like conduct by a male is not. *State v. Johnson*, 257 N.W.2d 503 (Wis. 1976), is an analogous case involving selective prosecution of females

under a prostitution statute in the state of Wisconsin. In *Johnson*, criminal complaints were filed charging female defendants with sexual perversion under a prostitution statute. The female defendants filed a motion to dismiss the complaints on the grounds that the defendants were being deprived of equal protection under the laws because they were being selectively prosecuted for prostitution when the male patrons were not being so prosecuted. At the hearing on the motion, no evidence was offered by the defendants and the trial court heard argument and dismissed the complaints. The trial judge concluded that women were being charged with prostitution and that male participants were not being charged with prostitution or other related sexual morality offenses and that this constituted discriminatory enforcement of the law, and the state appealed. The supreme court of Wisconsin recognized that under the Fourteenth Amendment to the United States Constitution persons accused of violating criminal statutes are protected from persistent selective and intentional discrimination in the enforcement of the statute in the absence of valid exercise of prosecutorial discretion (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), and other state cases). *Id.* at 505. The *Johnson* court stated, "[i]f women prostitutes are consistently prosecuted and men patrons are consistently not prosecuted, without valid prosecutorial discretion, the equal protection clause is violated." The *Johnson* court concluded:

> There may be valid prosecutorial reasons for prosecuting a prostitute and not the patron under given circumstances such as organized

> commercial prostitution, immunity from prosecution to testify, and others. Nor can one or few isolated incidents of failure to prosecute both be sufficient grounds to escape prosecution for a criminal act upon equal protection grounds. To avoid prosecution for a criminal offense upon equal protection grounds, *it must be shown that the failure to prosecute was selective, persistent, discriminatory and without justifiable prosecutorial discretion* (emphasis added).

Id. at 507.

The court found that defendants presented no evidence to raise the constitutional defense and reversed in favor of the state stating:

> At the hearing on the remand the defendants have the burden to establish a prima facie case. There must be some showing of persistent failure to prosecute men as well as women involved in prostitution. The isolated facts of this case are insufficient. If a prima facie case is established, the burden to show an exercise of valid prosecutorial discretion will shift to the state.

Id. at 507.

We find that the appellant produced no evidence to prove her claim of denial of equal protection of the laws and failed to meet her burden of establishing *prima facie* the fact of selective prosecution. *Gawlik,* 608 S.W.2d at 673. We overrule appellant's points of error one and two.

The judgment of the trial court is affirmed.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed December 30, 1996.

Panel consists of Justices Lee, Amidei, and Edelman (Justice Edelman concurs in the result only).

Publish – TEX. R. APP. P. 90.

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HOUSTON TEX JAN 10 '97 — U.S. POSTAGE January 8 1997 — 0.20 — PB METER 6305516

RE: Case No. 14-95-00297-CR

Style: Carreras, Angelina Anita
v. The State of Texas

Please be advised that on this date appellant's motion for rehearing was received and filed in the above cause.

T. C. Case # 93-24826

Mary Jane Smart, Clerk

Dale W. Felton
Felton & Associates
1177 West Loop South
Suite 1450
Houston, TX 77027

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

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HOUSTON, TX PM

HOUSTON TEX JAN 23'97

January 22, 1997

RE: Case No. 14-95-00297-CR

Style: Carreras, Angelina Anita
v. The State of Texas

Please be advised that, on this date, the Court OVERRULED appellant's motion for rehearing in the above cause. The PDR is due on or before February 24, 1997.

T. C. Case # 93-24826

Mary Jane Smart, Clerk

Dale W. Felton
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1177 West Loop South
Suite 1450
Houston, TX 77027

77027/3008

APPENDIX 3

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

OFFICIAL BUSINESS
STATE OF TEXAS
STATE PENALTY
FOR PRIVATE USE



RE: Case No. 14-95-00297-CR

Style: Carreras, Angelina Anita
v. The State of Texas

Appellant's Petition For Discretionary Review was received and filed on this date. Record will be forwarded to the Court of Criminal Appeals within our fifteen (15) day deadline.

T. C. Case # 93-24826

Mary Jane Smart, Clerk

Dale W. Felton
Felton & Associates
1177 West Loop South
Suite 1450
Houston, TX 77027

App. 14

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

June 4, 1997
COA# [redacted]-CR
RE: [redacted]-97
[redacted] ANGELINA ANITA

On this day the Appellant's Petition for Discretionary Review has been REFUSED.

AUSTIN JUN 04'97 020 PB METER 7|5|297 U.S. POSTAGE

(JUDGES BAIRD & PRICE WOULD GRANT)

Troy C. Bennett, Jr., Clerk

DALE FELTON
FELTON & MASON
1177 WEST LOOP SOUTH STE 1450
HOUSTON TX 77027

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